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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Application by New York Telephone Company for Authorization to Provide In-Region, InterLATA Services in New York; CC Docket No. 99-295*

Dear Ms. Salas:

At the request of staff, this letter amplifies the reasons why Bell Atlantic - New York's ("Bell Atlantic") provisioning of special access falls under the Competitive Checklist of 47 U.S.C. § 271(c)(2)(B) as well as the public interest analysis of 47 U.S.C. § 271(d)(3)(C), both of which the Commission must apply in evaluating the above-referenced application.

Under the Competitive Checklist, the Commission must evaluate Bell Atlantic's performance in provisioning "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services," and "local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."^{1/} The Commission has interpreted the Competitive Checklist also to include combinations of the foregoing network elements.^{2/}

Special access is a combination of local loop transmission and local transport. The Commission recognized this fact in ruling upon Bell Atlantic's Expanded Extended Link

^{1/} 47 U.S.C. § 271(c)(2)(B)(iv) & (v).

^{2/} See *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, FCC 97-418, 13 FCC Rcd. 539, ¶ 182 (rel. December 24, 1997) (interpreting 47 U.S.C. § 271(c)(2)(B)(ii) to include combinations of unbundled network elements).

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("EEL"), which Bell Atlantic admits to be a combination of local loops and transport: "we note that incumbent LECs routinely provide the functional equivalent of the EEL through their special access offerings."^{3/} The Commission further recognized that requesting carriers could convert special access arrangements to EELs under 47 C.F.R. § 51.315(b),^{4/} which would represent nothing more than a change in the applicable rates because the actual facilities underlying EELs and special access arrangements are identical. In short, the Commission must consider Bell Atlantic's performance in providing special access under the Competitive Checklist to the same extent that it considers Bell Atlantic's performance in providing EELs.^{5/}

The Commission also may consider Bell Atlantic's performance in provisioning special access as part of evaluating whether Bell Atlantic's "requested authorization [to provide interLATA services] is consistent with the public interest, convenience and necessity."^{6/} Many competitive local exchange carriers in New York rely upon Bell Atlantic's special access services in order to offer telephone exchange service to end users. They do so because Bell Atlantic's EEL offering has only recently become available and, even then, there are serious questions as to its commercial availability.^{7/} The fact that the EEL is not a viable option for

^{3/} *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, ¶ 481 (rel. November 5, 1999) ("*UNE Remand Order*"); *see also Application by Bell Atlantic - New York for Authorization to Provide In-Region, InterLATA Services in New York*, at 27 (dated September 29, 1999) ("Bell Atlantic provides Enhanced Extended Loops (EELs), a combination of loops and transport") ("*Bell Atlantic Application*").

^{4/} *UNE Remand Order*, ¶ 480 ("the incumbent LECs may not separate loop and transport elements that are currently combined and purchased through the special access tariffs. Moreover, requesting carriers are entitled to obtain such existing loop-transport combinations at unbundled network element prices."); *see Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, CC Docket No. 96-98, at ¶5 (rel. November 24, 1999) (restricting the use of converted EELs to the provision of a significant amount of telephone exchange service) ("*Supplemental Order*").

^{5/} Even if the Commission were to believe that special access arrangements and EELs are not identical, it would still have to consider the availability of special access under the Competitive Checklist so that requesting carriers could seek conversions to EEL arrangements. By limiting requesting carriers' ability to purchase special access, Bell Atlantic effectively limits their ability to purchase EELs.

^{6/} *See* 47 U.S.C. § 271(d)(3)(C).

^{7/} Indeed, if Bell Atlantic provided EELs in a more reliable manner than special access, many of undersigned carriers instead would have an appreciable economic incentive to purchase EELs directly, given that EEL rates are substantially less than special access rates.

many competitors is Bell Atlantic's fault. Bell Atlantic cannot be heard now to complain that competitors should have been using the EEL all along the way. For these reasons, the public interest requires the Commission to consider Bell Atlantic's performance in providing special access.

Bell Atlantic's reply comments in this case provide the Commission little justification for ignoring Bell Atlantic's performance in provisioning special access. Bell Atlantic argues in conclusory fashion that "special access service is not part of the Competitive Checklist and therefore not relevant to this proceeding."^{9/} For the more detailed reasons stated above, Bell Atlantic is incorrect.^{9/} Bell Atlantic further argues that "[i]n any event, these complaints [about special access] involve a very small volume of special access circuits that is tiny in comparison to the amount of unbundled transport facilities that Bell Atlantic provides."^{10/} Bell Atlantic is again incorrect. The total number of unbundled transport facilities that Bell Atlantic provided as of September 29, 1999 — and therefore presumably would be the maximum number of EELs, which are more comparable to special access — was 325.^{11/} Omnipoint by itself has purchased twice this number of special access circuits in New York.^{12/} The problems with special access

However, facilities-based PCS carriers, such as Omnipoint and other wireless carriers, would not be able to use the EEL in the configuration currently set forth in Bell Atlantic's tariffs.

^{9/} Bell Atlantic Reply Comments, at 26.

^{9/} Bell Atlantic's actions belie its statement that special access is not part of the Competitive Checklist. Bell Atlantic has cited statistics of various competitive activities in New York, many of which are based upon the undersigned's use of special access. See Bell Atlantic Application, Appendix A, Volume 5 (Taylor Declaration), Attachment A. For instance, Bell Atlantic derived the total number of lines provided over competitors' own facilities by referencing the E911 database. See *id.*, at 2. Special access lines, such as those purchased by the undersigned, are registered in the E911 database. Unless Bell Atlantic took special measures to exclude these lines — which seems unlikely since Bell Atlantic does not even raise the issue in its application — its estimate of lines served over competitors' own facilities is dramatically skewed. The Commission should not tolerate Bell Atlantic relying upon special access lines in this manner to show a favorable picture of competition in New York at the same time that Bell Atlantic denies that special access is part of the Competitive Checklist.

^{10/} *Id.*, at 26-27.

^{11/} Bell Atlantic Application, Appendix A, Volume 5 (Taylor Declaration), Attachment A, at 1.

^{12/} Omnipoint Comments, at 8, n. 15.

impact competitive local exchange carriers to a much greater extent than Bell Atlantic admits.^{13/}

On November 19, 1999, Bell Atlantic provided additional argument to the Commission why it should not consider special access under the Competitive Checklist.^{14/} Bell Atlantic advanced two arguments that are worth refuting here. First, Bell Atlantic claimed that, in the *UNE Remand Order*, the Commission rejected U S West's offer to provide special access in lieu of unbundled transport "because, as a legal matter, special access services are different than unbundled transport facilities."^{15/} We do not disagree that special access services are different from unbundled transport. Special access also includes a loop component that unbundled transport does not. Setting this difference aside, special access differs from unbundled transport *as a legal matter* because special access is priced at an appreciably higher level. Because of this price differential, it was entirely logical for the Commission to conclude that the availability of special access is not a meaningful substitute for EELs. This unremarkable conclusion in no way supports Bell Atlantic's quite different point — that competitive local exchange carriers which do choose to purchase special access at a higher price to attain EEL functionality have no Checklist rights to complain about Bell Atlantic's deficient provisioning. Once again, the Commission did not hold in the *UNE Remand Order* that special access facilities are *physically* different from unbundled transport and loop facilities, nor did it conclude that special access is composed of network elements that are not covered by the Competitive Checklist. Consequently, Bell Atlantic's citation to the *UNE Remand Order* is inapposite.

Second, Bell Atlantic argues that the definition of unbundled transport is different from that of special access.^{16/} Unbundled transport is defined to travel "between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers," while at least one end of a special access arrangement travels directly to an end user's premises.^{17/} Bell Atlantic thus concludes that special access is different from unbundled local transport. At the risk of repeating ourselves, we have never disputed that conclusion. As stated above and in our *Ex Parte* Letter of December 1, 1999, special access is not merely composed of transport facilities; rather special access also

^{13/} At any rate, if the Commission were not to consider special access, it lacks a statistically significant number of transport arrangements to consider because Bell Atlantic claims to have provided only 325 (which is minute compared to the number of loops, for example, that Bell Atlantic claims to have provided).

^{14/} See Bell Atlantic *Ex Parte* Letter of Dee May to Claudia Pabo, CC Docket 99-295 (dated November 19, 1999).

^{15/} *Id.*, at ¶ 2 (citing *UNE Remand Order*, at ¶ 67).

^{16/} *Id.*, at ¶ 3.

^{17/} *Id.* (citing *UNE Remand Order*, Appendix C, at 6).

includes loop facilities. Furthermore, the Commission recently reaffirmed in the UNE Remand Order the right of competitive local exchange carriers to purchase special access and convert it into combinations of unbundled loops and transport. Thus, special access falls under items four and five of the Competitive Checklist, which relate to local loops and local transport. Bell Atlantic's argument fails to address this point entirely.

We understand that Bell Atlantic also has argued (in various *ex parte* submissions) against the Commission considering the provisioning of special access in this proceeding on the ground that special access is a retail service and the Competitive Checklist is designed to consider only the provisioning of wholesale services and unbundled network elements. Bell Atlantic draws a distinction without a difference. The claim that special access is a retail service means only that it is priced much higher than unbundled loops and transport.^{18/} At no point in this proceeding has Bell Atlantic argued (nor could it) that special access is composed of physical facilities other than local loops and local transport. Competitive Checklist items four and five are concerned with Bell Atlantic's provisioning of physical facilities, not with the various regulatory classifications that may apply to such facilities. Accordingly, the status of special access as a service does not remove it from the Competitive Checklist.^{19/}

^{18/} Whether special access is even a retail service is a debatable point. As Omnipoint has argued, special access is predominantly a wholesale service used by competitive carriers. Omnipoint Reply Comments, at 4. In Omnipoint's case, it requires special access to build out its broadband PCS network in New York, hardly a retail application of special access.

^{19/} Alternatively, if Bell Atlantic is arguing that the Commission cannot treat services as unbundled network elements, the Supreme Court soundly rejected that contention. *See AT&T Corporation v. Iowa Utilities Board*, ___ U.S. ___, 119 S.Ct. 721, 733 (1999) (citing "breadth" of definition of network elements in rejecting arguments of incumbents that "a 'network element' must be part of the physical facilities and equipment used to provide local phone service").

For the foregoing reasons, special access falls under the Competitive Checklist and should also be considered as part of the Commission's public interest analysis in this case. *See* 47 U.S.C. § 271(c)(2)(b)(iv) & (v); 47 U.S.C. § 271(d)(3)(C). If you have any questions regarding this letter, please call us.

Sincerely,

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